ISSUED: March 19, 2004

D.T.E. 02-46-A

Petition of the Town of Framingham for a determination of the rates applicable to the transportation and treatment of sewage pursuant to an intermunicipal agreement with the Town of Ashland.

ORDER DENYING MOTION OF TOWN OF ASHLAND FOR CLARIFICATION AND FOR EXTENSION OF JUDICIAL APPEAL PERIOD

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ORDER DENYING MOTION OF TOWN OF ASHLAND FOR CLARIFICATION AND FOR EXTENSION OF JUDICIAL APPEAL PERIOD

I. INTRODUCTION

On February 13, 2004, the Department of Telecommunications and Energy ("Department") issued a final order in D.T.E. 02-46 ("Order"), determining the amount to be paid by the Town of Ashland ("Ashland") to the Town of Framingham ("Framingham") to transport Ashland's sewage through Framingham's sewerage system. On March 1, 2004, Ashland submitted a "Motion for Request for Clarification [sic] Regarding the D.T.E. Final Order Issued February 13, 2004" ("Motion"). Ashland also requested ten additional days in which to file a petition for appeal after the Department's ruling on its motion (Motion at 2). Framingham filed its opposition to Ashland's Motion on March 8, 2004 ("Opposition").

II. MOTION FOR CLARIFICATION

A. Positions of the Parties

1. Ashland

Ashland's Motion poses a series of questions and requests clarification of selected passages of the Order. Ashland asks the Department to provide a "rationale" for its finding that "[m]ore than a discrete subset of Framingham's system is used to provide service to Ashland" (Motion at 1, quoting Order at 17). Next, Ashland asks the Department to clarify its statement that "the mathematical effect of adjusting both total flow and total [operations and maintenance costs ("O&M")] by the same factor is for these adjustments to cancel each other out" (id., quoting Order at 20). Further, Ashland asks the Department to clarify which pipes are being referred to in two passages pertaining to capital cost allocation (id. at 2). The first

passage reads: "Similarly, Ashland concedes as shared pipes those pipes identified in Framingham's response to the Department's request for a list of pipes used to transport Ashland's sewage during dry weather conditions (Ashland Initial Brief at 12, citing DTE-RR-8)." Order at 28. The second passage reads: "Section IV of this Order discusses the basic principle for allocating capital costs, as well as two special cases: (1) a capital project in which there are parallel pipes, and (2) a capital project involving an increase in pipe size for the purpose of accommodating higher flow capacity for one town only." Order at 48.

Ashland's Motion also attempts to raise the issue of notice requirements for Framingham's expected O&M projects and capital expenditures (id. at 1). Ashland asserts that the Order does not address notice requirements and provides no procedure for review of capital expenditures (id.). Ashland argues that it "must be able to predict and estimate the costs it will incur from year to year," and asks the Department to require Framingham to provide Ashland with at least six months notice of upcoming O&M and capital expenditures (id.). Further, Ashland argues that it should have the opportunity to review and comment on whether Framingham's capital expenditures are necessary, whether alternative capital projects are suitable, and whether the expenditures are reasonable (id. at 2).

2. Framingham

Framingham responds that Ashland has not demonstrated a need for clarification of the Department's finding that more than a discrete subset of Framingham's system is used to provide service to Ashland. Framingham argues that the Department's finding was explained by its statement that the physical extent of Framingham's system needed to accommodate

Ashland's sewage varies, depending on the volume of flow and hydraulic conditions within Framingham's sewerage system at any given time (Opposition at 1).

Next, Framingham argues that it is unnecessary to clarify the Department's finding that "the mathematical effect of adjusting both total flow and total O&M by the same factor is for these adjustments to cancel each other out." Framingham states that the Department expounded over three pages on Ashland's "tributary flow formula," which raised the question of the proposed adjustments (id. at 2, citing Order at 18-20). Framingham argues that the meaning of the Department's language is clear that in "strictly mathematical terms," if the two numbers are multiplied by the same percentage, the ratio of those two numbers will be the same (id. at 3).

Regarding Ashland's request for clarification of which pipes are subject to the Department's capital cost allocation formulas, Framingham responds that the three formulas apply to the same set of pipes (id. at 5). Framingham argues that no further clarification is necessary, because the "basic" formula and the two special case formulas apply to the pipe segments identified in DTE-RR-8 (id., citing Order at 28, 31, 38-50).

Regarding Ashland's assertion that it is entitled to six months advance notice of Framingham's expected O&M and capital expenditures, Framingham argues that this is not in the nature of a request for clarification, because Ashland introduced no argument or evidence during the hearings as to the need for or practicability of such notice (id. at 3). Framingham argues that the intermunicipal agreement ("IMA") does not have a six-month notice requirement, but rather, provides only that Framingham should bill Ashland at six-month

intervals, based on actual usage during the preceding six-month period (id. at 3, citing Exh. FR-14, ¶ 5).[1] Framingham argues that because there is no notice requirement in either the IMA or the Special Act, Ashland's request is outside the scope of the Department's jurisdiction (id. at 3 n.1).

Framingham argues that Ashland's contention that it should have the opportunity to review and comment on proposed capital expenditures is not a proper request for clarification. Framingham states that the Department already considered, and did not adopt, Ashland's position regarding the extent to which it should be involved in Framingham's decisions regarding capital upgrades to its sewer system (id. at 4, citing Order at 36). Framingham argues that nothing in the IMA or the Special Act states that Ashland is entitled to any special rights to review and comment on proposed capital expenditures, and suggests it would be beyond the Department's jurisdiction to rule that Ashland should have the right to review and comment (id.). Framingham states that Ashland provides no explanation of what it should be entitled to do, even if the Department were to find that Ashland should have the right to review and comment on proposed capital expenditures (id.).

B. Standard of Review

Clarification of previously issued orders may be granted when an order is silent as to the disposition of a specific issue requiring determination in the order, or when the order

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[1] Framingham notes that the Department adopted the same billing approach because Ashland's O&M payment is based on final budget numbers and flow data from the same period (Opposition at 4, citing Order at 21-22). Framingham also notes that information regarding Framingham's budgeted capital expenditures is already available to the public, as well as to Ashland (id. at 4 n.2).

contains language that is sufficiently ambiguous to leave doubt as to its meaning. Boston Edison Company, D.P.U. 92-1A-B at 4 (1993); Whitinsville Water Company, D.P.U. 89-67-A at 1-2 (1989). Clarification does not involve reexamining the record for the purpose of substantively modifying a decision. Boston Edison Company, D.P.U. 90-335-A at 3 (1992), citing Fitchburg Gas & Electric Light Company, D.P.U. 18296/18297, at 2 (1976).

C. Analysis and Findings

Except for Ashland's arguments pertaining to proposed requirements for notice and for review and comment in future O&M and capital investment projects, Ashland's Motion is entirely devoid of any argument demonstrating why the Department must clarify its order in accordance with its longstanding standard of review of motions for clarification. Although titled a motion, it poses little more than a series of questions and requests for clarification, without identifying what is ambiguous about the selected passages. The questions on their own do not demonstrate any ambiguity or silence as to any issue required to be adjudicated.[2]

Regarding Ashland's plea for notice provisions, Ashland now argues for the first time on a motion for clarification that it will need at least six months' notice of proposed O&M and

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[2] On our own, we issue two corrections to conform cross-references in the Appendix to the analysis in the Order. These corrections are editorial merely and do not affect any findings in the Order. The passages, as they were, would not occasion any ambiguity requiring clarification. The section of the Appendix at 47, pertaining to the "Calculation of Ashland's Annual O&M Share" should cross-reference Section II of the Order, in which the Department determined the appropriate method of determining Ashland's annual O&M share. Similarly, the section of the Appendix at 48, pertaining to the "Allocation of Capital Costs" should cross-reference Section III, in which the Department determined the appropriate method of allocating capital costs.

capital expenditures. By its nature, a motion for clarification should be limited to matters on which the order is "silent as to the disposition of a specific issue requiring determination" or when the order contains "language that is sufficiently ambiguous to leave doubt as to its meaning." Although Ashland seeks clarification on notice requirements, Ashland does not rely on any fact in the record as a basis for clarification. Moreover, neither during hearing nor on brief did Ashland raise the question as one presented for decision by the Department. Therefore, clarification is not warranted.

As for Ashland's revised argument that it should have the opportunity to "review and comment" on Framingham's capital expenditures, we were not silent on this issue. We have already addressed this question, in part, by approving Framingham's proposal to credit the town not needing increased capacity with its share of the remaining asset value of the facilities being replaced. Order at 38-39. It is not for the Department to grant Ashland the right to veto, or the right to review and comment on, Framingham's capital projects, because that would reach beyond our statutory mandate to determine the just and proper sum that Ashland should pay. The Special Act assigns a specific and limited role to the Department, and that only in the narrow circumstances of inability of the Towns to reach agreement. We will not, indeed, we lack authority to, impose any procedural framework for the parties to follow in planning any future capital project.

The parties should note, however, that the Department established that Framingham may properly recover certain "prudently incurred project-related costs." Id. at 32. That is, Ashland may challenge whether capital project costs are prudently incurred, and hence,

whether its calculated share of the project is just and proper. See id. Whether any particular capital project cost has been prudently incurred is not yet ripe for adjudication; thus, Ashland presents no current controversy for the Department to review. The Towns may not call upon us to comment on speculative disputes that the Towns should resolve on their own. We have reiterated this point throughout this proceeding, and it does not need clarification.

III. MOTION FOR EXTENSION OF JUDICIAL APPEAL PERIOD

A. Positions of the Parties

Ashland requests an additional ten days in which to file a petition for appeal on the ground that "the Department's responses to these questions [posed in Ashland's Motion] will be a factor in Ashland's determination as to whether it will appeal" (Motion at 2). Framingham does not address this request.

B. Standard of Review

General Laws, c. 25, § 5, provides in pertinent part that a petition for appeal of a Department order must be filed with the Department no later than twenty days after service of the order "or within such further time as the commission may allow upon request filed prior to the expiration of the twenty days after the date of service of said decision, order or ruling." See also 220 C.M.R. § 1.11(11). The 20-day appeal period indicates a clear intention on the part of the Legislature to ensure that the decision to appeal a final order of the Department be made expeditiously. Nunnally, D.P.U. 92-34-A (1993); see also Silvia v. Laurie, 594 F.2d 892, 893 (1st Cir. 1978). The Department's procedural rule, 220 C.M.R. § 1.11(11) states that reasonable extensions may be granted upon a showing of good cause. The

Department has stated that good cause is a relative term and depends on the circumstances of an individual case. Boston Edison Company, D.P.U. 90-335-A at 4 (1992). Whether good cause has been shown "is determined in the context of any underlying statutory or regulatory requirement, and is based on a balancing of the public interest, the interest of the party seeking an exception, and the interests of any other party." Id. The filing of a motion for extension of the judicial appeal period tolls the appeal period for the movant until the Department has ruled on the motion. Nandy, D.P.U. 94-AD-4-A n.6 (1994); Nunnally, D.P.U. 92-34-A at 6 n.6.

C. Analysis and Findings

Notwithstanding our longstanding precedent on consideration of motions to extend the judicial appeal period, Ashland requests an extension without addressing any balancing of the public interest and the parties' interests. Save for a conclusory statement that Ashland would require ten days after the Department rules on its motion for clarification to evaluate whether it would appeal the final Order, Ashland does not articulate any reason for its request. Given that the billing period for which the final Order applies began on December 9, 2003, the balancing of the interests of all parties favors finality, rather than an extension. Thus, Ashland has not demonstrated good cause for an extension, and the motion must be denied.

By statute, the judicial appeal period expires twenty days after the issuance of a final order. G.L. c. 25, § 5. The Department's customary practice when parties file motions for extension of the judicial appeal period is to toll the period for the movant until the Department has ruled. See Eastern Energy Corp. v. Energy Facilities Siting Board, 419 Mass. 151, 154-55 (1994). When Ashland filed its motion, three days remained in judicial appeal period.

Ashland has had ample opportunity to evaluate its claims in light of the final Order since February 13, 2004, and the motion did not affect the Order's finality. Therefore, we find that according Ashland the remaining three days in order to file a petition for appeal is reasonable in this case.[3]

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[3] We note that after Ashland filed its motion, the hearing officer apprised Ashland's counsel of the Department's precedent regarding the tolling of the appeal period according to G.L. c. 25, § 5 (See Letter from David M. Thomas, Esq., dated March 2, 2004). Therefore, Ashland is already aware that the time remaining to file its petition for appeal is limited.

V. ORDER

After due notice and consideration, it is

ORDERED: that the motion of the Town of Ashland for clarification of the final order, dated February 13, 2004, is DENIED; and it is

FURTHER ORDERED: that the motion of the Town of Ashland for extension of the judicial appeal period is DENIED, and the judicial appeal period shall expire three business days after issuance of this order.

By Order of the Department,

/s/
Paul G. Afonso, Chairman

/s/
James Connelly, Commissioner

/s/
W. Robert Keating, Commissioner

/s/
Eugene J. Sullivan, Jr., Commissioner

/s/
Deirdre K. Manning, Commissioner